SUPREME COURT, U.S.
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No. 88-2138

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ILEENE GRAY, formerly ILEENE HEFFRON,

Petitioner,

v.

NORTHWEST BANK & TRUST COMPANY, Successor Fiduciary of the Estate of Joseph Heffron,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF IOWA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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CERTIFICATE OF SERVICE

I, Thomas C. Fritzsche, a member of the Bar of the Supreme Court of the United States and counsel of record for Petitioner herein, hereby certify that on September 6, 1989, I served three copies of the attached Petitioner's Reply to Respondent's Brief in Opposition on Respondent, by personal delivery to Scott H. Walters, Esq., 1503 Brady Street, Davenport, Iowa 52803, counsel for Respondent.

All parties required to be served have been served.

Dated September 6, 1989.

Thomas C. Fritzsche

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The principal thrust of Respondent's Brief in Opposition to the grant of certiorari by this Court is that Petitioner is attempting to raise serious constitutional issues for the first time in this court without having raised them in the trial court and state court appellate preceedings. This factual

claim is untrue and is exposed by citation to the record below.[1]

Respondent's claim that new "issues" are being raised for the first time in this court confuses the reality that the single essential constitutional issue of the entitlement of the parties' Arkansas divorce decree to enforcement under the Full Faith and Credit clause of the U.S. Constitution has been at the heart of this case since the start, with the further fact that at various stages of this proceeding, appropriate to the evolving decisions of the trial court and the Iowa Court of Appeals, Petitioner has used varying characterizations of arguments in support of her consistent position that the Arkansas decree is

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1 Pursuant to Supreme Court Rule 19.1, a certified copy of the record below has not yet been filed in this certiorari proceeding. Cited references to the record below are set out in the body of this Reply.

constitutionally entitled to full-faith-and-credit enforcement by the courts of its sister state in Iowa.

Petitioner first raised the essential "full faith and credit" issue pre-trial in her Motion for Partial Summary Judgment filed February 11, 1987. In this Motion at Paragraph 2, Petitioner expressly claimed:

> "2. That as a matter of law the Arkansas decree ordering the Bonds retained in joint ownership between Claimant and decedent is entitled to Full Faith and Credit in this Court and is binding upon the Fiduciary as successor and privy to the decedent."

Respondent resisted this Motion for Partial Summary Judgment by asserting a challenge to the exercise of in personam jurisdiction of the Arkansas court, so that the issue was held over for trial on July 8, 1987. The trial court's decision was rendered on September 29, 1987 (App. 17-36 of Pet. for Cert.)

The trial court in its decision expressly noted the preservation of Petitioner's claim to "full faith and credit". (App. 29 of Pet. for Cert.) However, the trial court ruled that the Arkansas decree was not entitled to full faith and credit by holding as a matter of law that the Arkansas court could not exercise in personam jurisdiction over the decedent by constructive notice only of its divorce proceeding. (App. 30, 32 of Pet. for Cert.).

Petitioner squarely challenged the trial court's erroneous holding on appeal to the Iowa Court of Appeals. Petitioner's challenge went directly to the trial court's erroneous holding and was set out at page 10 of Petitioner's Brief to the Iowa Court of Appeals:

> "The trial court, however, concluded that since the Arkansas divorce decree was 'based upon constructive notice only,' it could not affect his rights in property, regardless of any decree

> recitations. In reaching this conclusion, the trial court makes a gratuitous assumption that the Arkansas court did not have personal jurisdiction over decedent. It is fundamental, however, in constitutional law that a court may exercise personal jurisdiction over the residents of its own state. Almost fifty years ago the United States Supreme Court recognized that domicile within a state is alone sufficient nexus to bring an absent defendant within the reach of the forum state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Milliken v. Meyer, 311 U.S. 457, 462,85 L.Ed. 278,283 (1940). With both decedent and Claimant Arkansas residents, the Arkansas court had full personal jurisdiction to determine the property rights of the parties."

Petitioner unmistakably preserved the consitutional issue on appeal when she concluded her argument:

> "The trial court erred in not giving full faith and credit to the Arkansas divorce decree, commanding that the bonds remain in joint tenancy until further order of court." (Pet. Br. to the Iowa Court of Appeals at 23).

In its decision on appeal, the Iowa Court of Appeals affirmed the trial court judgment's refusal to accord full faith and credit to the Arkansas decree's property division provisions, but it did so on an entirely differently basis than that of the trial court. The Iowa Court of Appeals decision impliedly recognized the validity of Petitioner's argument that personal jurisdiction could be acquired over an absent defendant, consistent with due process, by means other than personal service (in this case publication and certified mail with proof of receipt by return mail).

The Iowa Court of Appeals side-stepped the issue of consititutionally valid substituted service, and refused to accord full faith and credit to the Arkansas decree as it found an absence of jurisdictional predicate or "sufficient relationships" for the State of Arkansas

to exercise its judicial power over the person of the decedent. (App. 7, 8 of Pet. for Cert.) This conclusion, announced for the first time in the Iowa Court of Appeals decision, was challenged by Petitioner's Application (to the Iowa Supreme Court) for Further Review.[2]

In Petitioner's Application for Further Review, she squarely challenged the trial court's and Iowa Court of Appeals' ability to upset the express finding of the Arkansas court on the face of its decree as to its jurisdictional predicate, without a "heavy burden of clear and convincing evidence." This challenge was primarily argued in terms

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2 The Iowa Rules of Appellate Procedure do not allow for rehearing petitions before the Iowa Court of Appeals. The only state recourse for challenging erroneous applications of fact or law is via a Rule 402 Application for Further Review to the Iowa Supreme Court. That Court refused to accept the case for further reiew by order entered on March 31, 1989. (App. 16 of Pet. for Cert.)

of controlling constitutional precedents of the Iowa Supreme Court. However, Petitioner also preserved a federal constitutional challenge when she expressly argued at page 6 of her Application (to the Iowa Supreme Court) for Further Review:

> "This requirement of clear and convincing evidence may be constitutionally mandated via the Federal Full Faith and Credit clause. Compare the plurality opinions of the United States Supreme Court in Williams v. North Carolina, 325 U.S. 226, 239 (1945). While a three justice dissent strongly argued against collateral attack on foreign divorce decrees, the three justices who supported the court's concurring opinion insisted on a high standard of proof in establishing what amounted to a claim of fraudulently invoked jurisdiction. See 325 U.S. at 240."

Ironically, it is Respondent, and not Petitioner, who for the first time in this certiorari proceeding raises a wholly new issue for which there is no basis in the record below.

At trial there was no challenge by Respondent to the mechanical question of compliance by the Arkansas court with the Arkansas statutory procedures for service of process on out-of-state individuals. Thus in Petitioner's Brief to the Iowa Court of Apeals she noted at page 12:

> "The Fiduciary did not challenge at trial the regularity of the Arkansas procedure whereby that state could exercise personal jurisdiction over its absent residents via substituted service. [The Iowa Rules of Civil Procedure provides a method of substituted service on residents of the State of Iowa who depart therefrom with intent to delay or avoid service. See Rule 60 (h).]" (footnote in brackets)

Respondent has raised the totally novel question of statutory compliance with the mechanics of Arkansas service-of-process procedure for the very first time in its Brief in Opposition. See Br. in Opp. pp. 12-19. In raising this new issue Respondent apparently asks this Court to take judicial notice of a

foreign statute, Ark. Act 119 of 1963, the statute cited at pp. 14-16 of Br. in Opp. This statute was not placed before the Iowa trial or appellate courts for consideration, and consequently is not of record. Further, judicial notice will not be taken by this court in reviewing decisions of a state court, like Iowa in this case, of statutes of another state which were not set up in the state court and of which the state court did not take judicial notice. Bothwell v. Buckbee, Mears Co., 275 U.S.274, 278 (1927).[3]

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3 At trial Petitioner relied on the presumed validity of the Arkansas divorce decree which was regular on its face as to jurisdictional findings. Respondent had the heavy burden of challenging this decree's irregularity and never undertook a challenge on the basis of failure to comply with Arkansas statutory procedures. Constructive service in this case was by published warning order and certified mail service with return receipt acknowledged to the decedent in Iowa. There was never any claim by Peititioner that such service was in accord with the specific statute belatedly cited by Respondent for the first time in its Br. in Opp. However, the actual out-of-state service on decedent was in (cont'd)

Failure to comply with the specifics of Arkansas statutory procedure was never an issue in this case, because Respondent chose at trial not to raise this issue. The issue at trial was strictly whether or not personal jurisdiction could be constitutionally invoked via constructive service consisting of registered mail service with proof of return receipt. After spending nine pages of its Brief in Opposition (pp. 12-20) attacking the "red herring" issue of failure to comply with a specific Arkansas statute not relied on by Petitioner,

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3 (cont'd) compliance with an alternate "long-arm" Arkansas statute governing service of process, Ark. Act 101 of 1963, passed in the same legislative session as the statute cited by Respondent. Ark. Act 101 of 1963 provides at Section 2(A)(1): "When the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made: ...(c) by any form of mail addressed to the person to be served and requiring a signed receipt". For a discussion of these alternative Arkansas process statutes and their use in perfecting personal jurisdiction over out-of-state defendants, see Note, "Personal Jurisdiction Over Out-of-State Defendants," 18 Ark. L. Rev. 124 (1964).

Respondent casually suggests:

> "Service by certified mail, return receipt requested would have been insufficient to confer in personam jurisdiction under the matrimonial long-arm statutes, and in all likelihood, statutes allowing such service may violate the Constitutional due precess requirement of fundamental (sic) mandated by this court in International Shoe Co. v. Washington, 326 U.S. 310...(1945) (emphasis added). (Br. in Opp. 20-21).

This casual underscored suggestion of Respondent is submitted without any authority at all! Petitioner believes that the Court's historic decision in Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 314-15 (1950) is entirely dispositive of this issue. The Mullane test for notice complianace with due process has been repeatedly cited by subsequent courts:

> "An elementary and fundamental requirement of due process in any preoceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise

> interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314.

The Mullane court sanctioned service via ordinary mail to trust beneficiaries with known addresses, and reiterated express constitutional approval for substituted service outside a forum state such as was sanctioned by the court in Milliken v. Meyer, 311 U.S. 457 (1940). In the instant case decedent actually received the summons and complaint in the Arkansas divorce proceeding, retained local Iowa counsel who negotiated with Petitioner's Arkansas counsel, and made a counseled decision to let the Arkansas action proceed to a default judgment, a copy of which he received and never challenged during the six remaining years of his life.

The important and substantial question presented to this Court is not the due process effectiveness of substituted service. This issue was impliedly resolved by the Iowa Court of Appeals when it did not affirm the trial court's result on that basis. The critical question for this court's attention is the basis upon which the Iowa Court of Appeals rested its affirmance--the held absence of a constitutional jurisdictional predicate in the factual context where a foreign court has determined otherwise without fraud, and when the factual record clearly demonstrates those "certain minimum contacts" (last matrimonial domicile or domicile of the decedent) which will constitutionally support the proper

exercise of a foreign court's jurisdiction.

Respectfully Submitted,

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September 6, 1989